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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 986

JOHN T. REGAN,
Petitioner,

vs.

CAMERON KING, as Registrar of Voters in the City and County of San Francisco, State of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

U. S. WEBB,
WEBB, WEBB & OLDS,
Mills Tower, San Francisco, California,
Counsel for Petitioner.

PARKER-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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To the Honorable Harlan Fiske Stone, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Cir-

cuit affirming the judgment of the United States District Court for the Northern District of California, Southern Division, dismissing the action brought by petitioner, plaintiff below.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals appears in transcript of record at page 42.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals was entered on February 20, 1943. (R. p. 43.)

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Is a Japanese person born in the United States a citizen of the United States?

SUMMARY STATEMENT OF MATTER INVOLVED.

The facts are not in controversy. The facts as found by the Court appear in transcript of record at pages 18 to 26, both inclusive, and are stipulated to be correct. (R. p. 32.) The facts so far as need be set out in this summary are that respondent is now and

since March, 1941 has been the Registrar of Voters of the City and County of San Francisco, and as such is charged with the registration of electors of the State of California who reside therein, and with the care, custody and control of the register of voters therein; that registration is a prerequisite to the right of an elector to vote, including the right to vote for members of the House of Representatives, for members of the United States Senate and for Presidential Electors; that such registration is permanent and the name of anyone placed upon such register remains thereon during the life of the registrant and entitles such registrant to vote at all elections held in the City and County, unless such registration be sooner terminated for causes not herein involved, or cancelled upon the production of a certified copy of a judgment directing the cancellation to be made. That petitioner is a citizen of the United States and of the State of California, is and for several years last past has been a resident of such City and County, and is now and for several years last past has been a duly registered and qualified elector in such City and County and entitled to vote at all elections held therein for members of the House of Representatives and members of the Senate and Presidential Electors.

That petitioner has for several years last past regularly voted at elections held in such City and County, and it is his right and intention to so vote at elections hereafter held therein.

That by the Constitution and laws of the United States, and the Constitution and laws of the State of

California, the privilege of an elector, including the privilege of voting and of registration, is granted only to citizens of the United States and is withheld from and prohibited to all aliens ineligible to citizenship in the United States.

That among the many Japanese so registered and heretofore so voting and who will continue in subsequent elections to vote are those named at pages 22 and 23 of the transcript of record.

That such Japanese have for several years last past customarily voted in such City and County at elections held therein for members of the House of Representatives, members of the Senate and for Presidential electors, and will continue so to do at elections hereafter to be held unless their registration be terminated and cancelled and their names removed from the register of voters.

That the Japanese so registered and so voting were born in the United States.

That it is the right and privilege of the petitioner as a citizen of the United States and of the State of California to have all votes cast by him given their full and true value, force and effect with the votes of all other duly and regularly registered and qualified electors only, all without interference, impairment or denial, by or through persons ineligible to exercise the rights and privileges of electors of the State of California.

That unless the respondent is ordered and directed to strike and remove the names of said Japanese from

the register of voters of the City and County of San Francisco, said Japanese will vote at all elections hereafter held in said City and County.

PROVISION OF THE FEDERAL CONSTITUTION INVOLVED.

The question presented involves the construction of the first sentence of Section 1 of the Fourteenth Amendment of the Federal Constitution reading "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside".

STATEMENT OF JURISDICTION.

THE RIGHT TO VOTE FOR MEMBERS OF CONGRESS AND FOR PRESIDENTIAL ELECTORS IS BASED UPON THE CONSTITUTION OF THE UNITED STATES, AND ANY IMPAIRMENT OF THAT RIGHT IS WITHIN THE ORIGINAL JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES.

A. Constitutional provisions upon which the right to vote for members of Congress and for Presidential Electors is based.

1. Sec. 2 of Article I of the Constitution of the United States provides in part as follows:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of of the State Legislature."

2. Sec. 4 of Article I of the Constitution of the United States provides in part as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

3. Sec. 1 of Article II of the Constitution of the United States respecting election of the President of the United States provides in part as follows:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

4. Sec. 1 of the Fifteenth Amendment of the Constitution of the United States provides as follows:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

5. The Seventeenth Amendment to the Constitution of the United States provides in part as follows:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors

of the most numerous branch of the State legislatures."

6. Sec. 1 of Article II of the Constitution of the State of California provides in part as follows:

> *"Who are and who are not electors—Absent voters.* Every citizen of the United States, every person who shall have acquired the rights of citizenship under and by virtue of the treaty of Queretaro, and every naturalized citizen thereof, who shall have become such ninety days prior to any election, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the day of the election, and of the county in which he or she claims his or her vote ninety days, and in the election precinct forty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law; * * * provided, further, no alien ineligible to citizenship, * * * shall ever exercise the privileges of an elector in this state; * * *."

B. Statutory provisions under which the District Courts are expressly vested with jurisdiction of actions respecting impairment or interference with the right to vote for members of Congress and for Presidential Electors.

1. 8 U. S. C. A., Sec. 31 (Act of May 31, 1870, c. 114, Sec. 1, 16 Stat. 140), provides:

> *"Race, color, or previous condition not to affect right to vote.* All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school dis-

trict, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

2. 8 U. S. C. A., Sec. 43 (Act of April 20, 1871, c. 22, Sec. 1, 17 Stat. 13), provides as follows:

"*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. 28 U. S. C. A., Sec. 41, subsection 1, provides in part as follows:

"The district courts shall have original jurisdiction as follows:

(1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, * * *."

4. 28 U. S. C. A., Sec. 41, subsection 14, provides as follows:

> "*Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

C. Decisions of the Supreme Court and of the Circuit Courts of the United States holding that the United States District Courts have original jurisdiction of actions respecting impairment of the right of an elector to vote for members of Congress and for Presidential Electors.

In *Ex parte Yarbrough,* 110 U. S. 651, 28 L. ed. 274 (1884), the Supreme Court in denying a writ of habeas corpus to one who had been convicted under the Federal conspiracy statute for intimidating a citizen in his right and privilege to vote for a member of Congress, and in sustaining the validity of the Federal statute under which the defendant had been convicted, stated and held:

> "The States in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine.* They define who are to vote for the popular branch of their own Legislature, and the Constitution of the United States says the same

persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the State." (Emphasis supplied.)

The doctrine thus announced has never been deviated from and has been affirmed in many subsequent cases.

In *Wiley v. Sinkler,* 179 U. S. 58, 45 L. ed. 84 (1900), upon authority of the *Yarbrough* case, the Court recognized original jurisdiction in the District Court of an action for damages brought against election officials for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States, stating:

"The complaint, by alleging that the plaintiff was at the time, under the Constitution and laws of the state of South Carolina and the Constitution and laws of the United States, a duly qualified elector of the state, shows that the action is brought under the Constitution and laws of the United States."

Further, with respect to the jurisdictional amount, the Court said:

"The damages are laid at the sum of $2,500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion

of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the circuit court. *Barry v. Edmunds,* 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Scott v. Donald,* 165 U. S. 58, 89, 41 L. ed. 632, 638, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercook Co.,* 170 U. S. 468, 472, 42 L. ed. 1111, 1112, 18 Sup. Ct. Rep. 674; *North American Transp. & Trading Co. v. Morrison,* 178 U. S. 262, 267, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869.

The circuit court therefore clearly had jurisdiction of this action, and we are brought to the consideration of the other objections presented by the demurrer to the complaint."

Swafford v. Templeton, 185 U. S. 488, 46 L. ed. 1005 (1902), involved an action to recover damages from state election officials for their asserted wrongful refusal to permit the plaintiff to vote for a member of the House of Representatives. In reversing the ruling of the Circuit Court dismissing the action on the ground that it was not one within the jurisdiction of the court, the Supreme Court in referring to *Wiley v. Sinkler,* supra, stated and held:

"That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the United States had adopted, as the qualifi-

cations of electors for members of Congress, those prescribed by the state of electors of the most numerous branch of the legislature of the state.

It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim."

Giles v. Harris, 189 U. S. 475, 47 L. ed. 909 (1903), involved a bill in equity to compel a board of registrars to enroll a negro upon the voting lists. The Supreme Court recognized jurisdiction of the Circuit Court to entertain the action by reason of the provisions of Rev. Stat. par. 629, cl. 16 (28 U. S. C. 41, subsection 14), coupled with Rev. Stat. par. 1979 (8 U. S. C. A. 43), but sustained the action of the lower Court in dismissing the bill on other grounds not here involved.

In *Guinn v. U. S.,* 238 U. S. 347, 59 L. ed. 1340 (1914), state election officials who conspired to deprive negro citizens of their right to vote secured by the Fifteenth Amendment to the Constitution of the United States were held indictable under the Federal conspiracy statute, making it a criminal offense to "conspire to injure, oppress, threaten, or intimidate, any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States".

In *Myers v. Anderson,* 238 U. S. 367, 59 L. ed. 1349 (1915), the Supreme Court affirmed judgments awarding damages against state election officials for denying the right of suffrage to negro citizens. Jurisdiction was held to exist under Rev. Stat. Sec. 1979 (8 U. S. C. Sec. 43), and this irrespective of the amount in controversy.

In *U. S. v. Mosley,* 238 U. S. 383, 59 L. ed. 1355 (1914), the judgment of the lower Court sustaining a demurrer to an indictment charging state election officials with a conspiracy to omit the returns from certain precincts at a general election for members of Congress from their count and return to the state election board was reversed, the Court holding, upon the authority of the *Yarbrough* case, that the Federal conspiracy statute was constitutional, and then stating:

> "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box."

Nixon v. Herndon, 273 U. S. 536, 71 L. ed. 759 (1927), involved an action for damages against the judges of elections for refusing to permit the plaintiff to vote at a primary election for the nomination of candidates for a senator and representatives of Congress and state and other officers. The plaintiff, a negro, had been refused the right to vote under a state statute. Upon motion by the defendants, the District Court dismissed the complaint upon the ground that the subject matter of the suit was political and not

within the jurisdiction of the Court, and that no violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States was shown.

In reversing the action of the lower Court, the Supreme Court stated:

> "The objection that the subject-matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years, since Ashby v. White, 2 Ld. Raym. 938, 92 Eng. Reprint, 126, 1 Eng. Rul. Cas. 521, 3 Ld. Raym. 320, 92 Eng. Reprint, 710, and has been recognized by this court. Wiley v. Sinkler, 179 U. S. 58, 64, 65, 45 L. ed. 84, 88, 89, 21 Sup. Ct. Rep. 17; Giles v. Harris, 189 U. S. 475, 485, 47 L. ed. 909, 911, 23 Sup. Ct. Rep. 639. See also Judicial Code, sec. 24 (11), (12), (14). Act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1092, Comp. Stat. Sec. 991, 4 Fed. Stat. Anno. 2d ed. p. 840. If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

U. S. v. Classic, 313 U. S. 299, 85 L. ed. 1368 (1941), involved an indictment under the Federal criminal statute respecting freedom of elections. The specific charge was that the defendants, conducting a primary election for nomination of a candidate of the Demo-

cratic Party for a representative in Congress, wilfully altered and falsely counted and certified the ballots of voters cast in the primary election. The action of the lower Court sustaining a demurrer to the indictment was reversed. In an able opinion, Mr. Justice Stone considers and affirms the decisions above referred to and approves the doctrine of those cases. He recognizes and reiterates that it is the right of qualified voters to vote at Congressional elections and to have their ballots counted as cast, and that such right is one secured by the Constitution of the United States and also protected by Section 1 of the Civil Rights Act of 1871. (8 U. S. C. Sec. 43.)

Wayne v. Venable (8th C. C. A. 1919), 260 Fed. 65, involved an action for damages for wrongful deprivation for his right to vote for a member of Congress. The Court after holding that such right of action existed in the plaintiff and original jurisdiction to be in the District Court upon the authority of *Wiley v. Sinkler,* supra, and *Swafford v. Templeton,* supra, stated at page 66:

> "In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right. Scott v. Donald, 165 U. S. 89, 17 Sup. Ct. 265, 41 L. ed. 632; Wiley v. Sinkler, 179 U. S. 58, 65, 21 Sup. Ct. 17, 45 L. ed. 84."

In *Walker v. U. S.* (8th C. C. A. 1937), 93 Fed. (2d) 383, a conviction under the Federal conspiracy statute for conspiracy to injure citizens in their right to vote for members of Congress and to have their votes counted as cast was affirmed. The specific charge was that after voters had marked and cast their ballots and deposited them in the ballot box, the defendants caused them to be counted and recorded other and differently than they had been cast. The indictment was assailed by the defendants upon the ground that the right protected by the conspiracy statute is a personal and individual one, while the conspiracy charged was one affecting the public right in result of all the votes. It was argued by defendants that when the voter cast his ballot, his personal interest ceased and merged in the general public interest. The Court, however, was not of this view and stated:

> " 'In view of the decision in the Mosley Case, supra, it seems unnecessary to do more than point out that this indictment charges the conspiracy as one to injure and oppress voters, not candidates for office, and that it is self-evident that a legal voter is injured unless he is not only permitted to vote, but to have his vote counted as cast.' "

Berry v. Davis (8th C. C. A. 1926), 15 Fed. (2d) 488, involves a petition for mandamus which alleged the county and precinct registrar had refused to register negroes for a Presidential and Congressional election.

Issuance of a peremptory writ of mandamus by the District Court was sustained, the Court holding juris-

diction to be in the lower Court under Sections 24 (1) and 24 (11) of the Judicial Code (28 U. S. C. 41 (1 and 11)) solely upon the fact that the action arose under the Constitution of the United States. (Fourteenth and Fifteenth Amendments thereto.)

No diversity of citizenship or other basis of jurisdiction was pleaded or claimed.

Further, writs of error to the Circuit Court were dismissed upon the same basis that jurisdiction was held to be in the trial Court, since under Section 238 of the Judicial Code (Section 1215 Comp. Stat.) in a "case that involves the construction or application of the Constitution of the United States", jurisdiction to review the judgment of the District Court is exclusively in the Supreme Court of the United States, and the Circuit Court has no such jurisdiction or power.

See, also:

Knight v. Shelton (1905), 134 Fed. 423;
Brickhouse v. Brooks (1908), 165 Fed. 534;
Anderson v. Myers (1910), 182 Fed. 223, affirmed by the Supreme Court in *Myers v. Anderson,* supra.

D. Other decisions respecting the nature of the right to vote.

In *Ex parte Yarbrough,* supra, the Supreme Court in sustaining and referring to the power of Congress in its enactment of the Federal conspiracy statute to control elections stated:

"This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of Congress and its President are elected shall be the *free votes of the electors,* and the officers thus chosen the free and uncorrupted choice *of those who have the right to take part in that choice.*" (Emphasis supplied.)

In *Swindall v. State Election Board,* 32 Pac. (2d) 691 (Okla. 1934), the Court in discussing the intrinsic nature of the right to vote quoted from the case of *Dove v. Oglesby,* 114 Okl. 144, 244 P. 798, as follows:

" 'While the right of suffrage does not inhere in the mere right to live or to exist, yet it does inhere in the right of self-government, and the free exercise of such right is essential to the maintenance of self-government.' "

In *McKinney v. Barker,* 180 Ky. 526, 203 S. W. 303, 1918E L. R. A. 581, the Court in disapproving legislation which would permit election of persons to public office by less than a majority of votes and in interpreting the word "election" as used in the state constitution, stated and held:

"Applying then the rule just stated to the case in hand, what, may we inquire, did the framers of the Constitution mean by the use of the word 'election' as employed in that instrument, when applied to the selection of officers by the people? We have seen that the meaning universally given

to that term by the courts, at least throughout the United States, was a selection of choice by the legally qualified voters participating therein, casting for the successful candidate a *majority* or a *plurality* of the votes, and that no one could be declared elected at such an election who did not receive votes sufficient to give him either a majority or a plurality. This being true, it necessarily follows that the Constitution used the word in that sense as completely as if the definition had been so written therein, and that any act of the legislature restricting that meaning, so as to make a less number of votes sufficient to elect, contravenes the Constitution, and is necessarily null and void. To hold otherwise would not only be to sanction a perversion of the plain intent and meaning of the Constitution, but it would enable the legislature to strike a blow at the very foundation stone of our boasted republican form of government, for when we cease to be governed and have public affairs administered by officers elected by a majority or a plurality of *the legal votes of those entitled to exercise the right of suffrage,* we turn aside from the idea of such form of government, and put its administration into the hands of the minority, * * *." (Emphasis supplied.)

In *Edmonds v. Banbury,* 28 Iowa 267, 4 Am. Rep. 177 (1869), Supreme Court of Iowa, in discussing the right of suffrage, stated:

> "Every citizen who is entitled to vote is interested in having excluded from the box the ballots of those not entitled."

In *Ladd v. Holmes,* 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714 (1901), the Court stated:

> "Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege. Now, if persons not legitimately entitled to vote are permitted to do so, the legal voter is denied his adequate, proportionate share of influence and the result is that the election, as to him, is unequal; that is, he is denied the equal influence to which he is entitled with all other qualified electors: 'Ballot Reform, Its Constitutionality' (John H. Wigmore), 23 Am. Law Rev. 719; Edmonds v. Banbury, 28 Iowa 267, 271, 4 Am. Rep. 177; Davis v. School Dist., 44 N. H. 398, 404; Commonwealth v. McClelland, 83 Ky. 686."

E. Decisions of the Federal Courts respecting original jurisdiction of the District Courts of the United States in actions involving enforcement of civil rights generally.

The cases which follow hold original jurisdiction to exist in the District Courts in actions to enjoin acts by state officers in derogation of civil rights.

In *Hague v. Committee for Industrial Organization,* 307 U. S. 496, 83 L. ed. 1423 (1938), the Supreme Court affirmed a decree of the Circuit Court affirming a decree of the District Court enjoining city officials from enforcing a municipal ordinance which prohibited public assemblies and distribution of literature except under certain stringent conditions.

The Court, after observing that the right involved was a civil right inherent in citizenship of the United States and protected by the Fourteenth Amendment, held original jurisdiction to exist in the District Court under Section 24, subsection 14 of the Federal Judicial Code. (28 U. S. C. 41 (14).)

Chadiali v. Delaware State Medical Society, 28 Fed. Supp. 841 (1939), the District Court retained jurisdiction in an action against state officials respecting interference with plaintiff's freedom of speech. In so holding, the Court stated:

> " 'The conclusion seems inescapable that the right conferred by the Act of 1871 (8 U. S. C. 43) to maintain a suit in equity in the federal courts to protect the suitor against a deprivation of rights or immunities secured by the Constitution, has been preserved, and that whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under Sec. 24 (14) of the Judicial Code to entertain it without proof that the amount in controversy exceeds $3,000. * * *' "

In *Sweeny v. Pennsylvania Dept. of Public Assistance Board,* 33 Fed. Supp. 587 (1940), the District Court retained jurisdiction of an action against city officials charging infringement of personal liberty through enforcement of regulation adopted under a public relief law. Upon the authority of the *Hague* case, supra, original jurisdiction was expressly held to exist under 28 U. S. C. 41(14) without allegation of diversity of citizenship, and without proof that

the amount in controversy was of a value in excess of $3000.

In *Oney v. Oklahoma City* (10th C. C. A. 1941), 120 Fed. (2d) 861, the Court held sufficient a complaint for injunctive relief charging law enforcement officers of the city with wrongful construction and application of an ordinance respecting dissemination of literature.

The Court held that the particular civil rights involved were privileges and immunities secured by the due process clause of the Fourteenth Amendment, and were within the ambit of 8 U. S. C. 43 and 28 U. S. C. 41 (14), and concluded that jurisdiction as to the individual plaintiffs existed under 28 U. S. C. 41 (14).

Interference with the right of plaintiff as a qualified elector.

The right to vote for members of Congress and for presidential electors is a personal civil right based upon the Constitution of the United States.

This right is grounded upon the Constitution as originally adopted and is further secured by the Fourteenth and Fifteenth Amendments thereto. It is also protected by those provisions of the Civil Rights Act, which comprise 8 U. S. C. 31 and 43, respectively enacted in 1870 and 1871.

This individual right finds its real basis in the principle of free self government upon which the United States is founded. It is the right of a qualified elector to participate in the choice of those who shall fill the public offices of his Government.

The right embraces not only the prerogative of a qualified elector to cast his vote, but also consists of the privilege of such elector to cast his vote in a legal election with all other qualified electors only and to have his vote counted and recorded as cast with the votes of all other qualified electors only—all to the end that the qualified elector shall be accorded his true, adequate and proportionate share of influence in the ultimate selection of the officers of his Government.

Under the qualifications prescribed by Section 1 of Article II of the Constitution of the State of California and adopted by the Constitution of the United States, this right is given and confined to citizens of the United States and is expressly withheld from and denied to aliens ineligible to citizenship of the United States.

Manifestly, if, as charged by the complaint, the Japanese who have been registered as electors and have been permitted to and will in the future be enabled by such registration to vote at congressional and presidential elections are aliens ineligible to citizenship and are, in fact, alien enemies, the right of plaintiff as a duly qualified and registered elector has been and will continue to be interfered with and impaired.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Circuit Court of Appeals erred—

(1) In holding that Japanese persons born in the United States are citizens of the United States.

(2) In dismissing plaintiff's action.

(3) In holding that the question here involved had been decided by this Court in *U. S. v. Wong Kim Ark,* 169 U. S. 649, and in *Perkins v. Elg,* 303 U. S. 325.

REASONS FOR GRANTING THE WRIT.

The writ applied for should be granted for the reason that this Court has never decided whether Japanese born in the United States are citizens of the United States, nor has the question heretofore been presented to this Court. It is true that this Court forty-five years ago decided that citizenship was extended to Chinese born in the United States by the Fourteenth Amendment of the Federal Constitution. It is believed that the difference in racial characteristics of the two peoples and the difference in the objectives of their respective governments may justify the conclusion reached in respect to Chinese, while compelling a decision that citizenship of Japanese is not thus granted.

It seems reasonable to believe that the framers of the Fourteenth Amendment did not intend to wholly disregard the element of fitness, of adaptability, for American citizenship. One is repelled by the thought that Congress in proposing the Fourteenth Amendment, and the States in ratifying it, intended to automatically extend citizenship to *all* persons born in the United States, the unfit, the unsuitable, as well as to the fit and to the suitable. A construction should not

be adopted which would achieve what was not intended.

The naturalization laws provide the means and methods of ascertaining fitness and adaptability. This question is judicially determined upon the evidence submitted, and the applications of the fit approved, and of the unfit rejected. But the Fourteenth Amendment provides no method of determining fitness. It does not follow from the absence of such provisions in the Fourteenth Amendment that the unfit are by its terms granted citizenship.

When adopted, the Constitution contained a declaration of purposes, of objectives. These purposes and objectives are enumerated in the first paragraph, the Preamble. A statute in conflict with these purposes, or either of them, would readily be declared unconstitutional. An amendment of the Constitution which in its terms would prevent the accomplishment of these declared purposes, or of either of them, could be upheld only by holding that such amendment modified or amended the Preamble, for both the Preamble and an amendment of the Constitution in conflict therewith could not stand. This petition is written in the belief that the objectives of the Constitution were not lost, destroyed or changed by the Fourteenth Amendment.

This leads us to a consideration of the question of fitness, of adaptability of the Japanese people for citizenship. The racial characteristics of these people and the form and purposes of their government, later in this summary adverted to, show indisputably the

unfitness of the Japanese people for American citizenship, for the exercise of the privileges of citizenship by the Japanese people in no way tend to further the "great purposes" of the Constitution enumerated in its Preamble, but on the contrary antagonize and imperil such purposes.

But it is said that this Court has held that Chinese born in the United States were granted citizenship by the Fourteenth Amendment. The racial characteristics of the Chinese people and the form, purposes and objectives of the Chinese government show that the citizenship of Chinese born in the United States does not threaten and is not inconsistent with constitutional purposes.

The holding of this Court that citizenship was extended by the Fourteenth Amendment (*U. S. v. Wong Kim Ark,* 169 U. S. 649) to Chinese born in the United States cannot be held as a decision of the question here presented unless the dissimilarity of the two peoples and the differences in the aims, purposes and form of their respective governments be wholly disregarded.

It is true that it has been the national policy to restrict citizenship by naturalization to white people and to prohibit the immigration of people of color, and it is widely and with much reason contended that the Fourteenth Amendment should be construed in harmony with this national policy so long and so steadfastly adhered to. This subject will be discussed in the brief supporting this petition and appended hereto. In this connection, however, it should be re-

membered that neither in the Preamble nor elsewhere in the Constitution is citizenship made dependent upon color.

The authors of the Constitution and those who first administered it gave evidence of recognition of at least some of these differences. The Congress within the first year after the adoption of the Constitution exercised its power to adopt an uniform naturalization law and in that act restricted the privilege of naturalization to "free white persons". Though that act has been amended a score of times the restriction to "white persons" has been continued to this day. These differences in racial characteristics have been further emphasized in the policy of this government in reference to immigration, as shown by the Chinese Exclusion Act of 1882 and the Barred Zone Act of 1917 by which the immigration of the peoples of a large portion of Asia, including all of India, was prohibited, and also by the amendment of the Immigration Law in 1924 prohibiting the immigration of persons ineligible to citizenship.

It will thus be seen that the policy was adopted long before 1898 and has been continued since that date. We mention 1898 for the reason that it was in that year that the Supreme Court of the United States decided the case of *U. S. v. Wong Kim Ark,* for it is claimed that such decision citizenized all persons born in the United States.

Notwithstanding this steadfast adherence to the policy governing naturalization, it is recognized that by constitutional amendment citizenship could be ex-

tended to peoples not eligible to naturalization and this was done by the Fourteenth Amendment. It is worthy of mention, too, that such construction would solve many of the questions now disturbing the military authorities and the Courts as well.

The question was not created by the Japanese attack and destruction at Pearl Harbor. It has existed ever since the adoption of the Fourteenth Amendment, and particularly since the decision of the *Wong Kim Ark* case in 1898. Many judges, lawyers and others learned in the law have questioned the correctness of the decision in that case and have contended that the true construction of the Fourteenth Amendment was made in the dissenting opinion. While the question of Japanese citizenship was not created by the war, interest in and the importance of the question has been by the war greatly intensified. It is now a question of great public importance and a decision of the question by this Court will serve as a guide to the various departments of the Federal Government, and particularaly to those upon whom rests the duty of prosecuting the war and of resisting Japanese aggression.

But a few days ago the Circuit Court of Appeals for the Ninth Circuit had before it the question whether the rights of some seventy thousand Japanese who, through the military authorities, had been removed from their homes and interned elsewhere, had been invaded. The Court apparently found itself embarrassed by the *Wong Kim Ark* case for regarding these seventy thousand Japanese as citizens of the United States, they were unable to determine if con-

stitutional rights had been invaded by their seizure and removal and internment. Regarding these seventy thousand Japanese as citizens, the Court evidently regarded their summary seizure and removal as too heroic for approval and as too militarily necessary for condemnation.

Under the naturalization law applications for naturalization are regularly presented and judicially heard. A definite period of residence is required. Upon examination, judicial in character, the fitness of the applicant is determined. If the applicant be found unfit, the application is rejected. If upon such examination it be determined that the applicant may safely be entrusted with the privileges and obligations and immunities of American citizenship, he is admitted but is required to take an oath of allegiance and to forswear allegiance to any other country. Through this process it is determined whether the citizenship of the applicant will be in furtherance of or in antagonism to the purposes of the Constitution, whether his citizenship will be a shield in defense of this government or a sword to be wielded against it.

Under the Fourteenth Amendment citizenship is acquired by birth alone. Citizenship is a possibility upon conception, wherever it occurs, and a certainty if birth occurs within the United States and this though parents are not citizens, are not eligible to citizenship, and may not be in any respect in harmony with the aims and objects of this government, and however antagonistic to this government an infant may grow to be, his citizenship may not be revoked

or questioned but will be his shield even in time of war, if the contention now being made in the Courts by Japanese claiming to be citizens be upheld.

Congress has prohibited the immigration of Japanese and we must assume it had a sound reason for so doing and how inconsistent with this act excluding Japanese from the privilege of residence in this country would be a construction of the Fourteenth Amendment giving to Japanese born in this country the privileges of citizenship. (*U. S. v. Thind,* 261 U. S. 206.)

If Japanese citizenship furthers constitutional purposes the extension to them of citizenship is not inhibited. If their citizenship conflicts with constitutional purposes the Preamble prohibits such citizenship. This phase of the subject warrants consideration of some of the characteristics of the Japanese people and of the polity of the Japanese government.

Because of racial characteristics Japanese assimiliation with whites is as impossible as it is undesirable. Their Emperor is the head of their church as well as the head of the nation. Hence, it may be said that their church is their government and their government is their church.

They believe that a war waged by their Emperor is a just war and that death upon the battlefield makes certain a satisfactory eternity and this religious devotion is translated into military power.

The offspring of Japanese are taught the Japanese faith and the objectives of the Japanese government

and are pledged to observance of both. Dishonesty, deceit and hypocrisy are racial characteristics and it is within the code of Japanese obligations that deceit, dishonesty and hypocrisy shall be employed, practiced and pursued whenever and wherever the result will be to advance the designs of the Empire. The presence of Japanese in the United States has resulted in disturbing evils and this condition is intensified by their ability to exercise the privilege of citizenship. Japan misled and deceived representatives of the United States government into a governmental policy through which Japan obtained from this government and from this country the material aid to build the war machine with which the United States is now confronted.

Japan has always claimed race superiority and has constantly declared that Japan was predestined to rule the world. This fateful doctrine was taught to Japanese children not only in the schools of Japan but in Japanese schools taught by Shinto priests maintained in the United States where children were given the same instruction as given in the schools maintained in Japan. Thousands of Japanese children born in this country were sent to Japan for their education and it is authoritatively stated that there are now in Japan more than fifty thousand Japanese born in the United States and now aiding the Japanese war effort.

It is the Japanese claim that the government of Japan is of divine origin, that the first Emperor was the grandson of the Sun Goddess, and that all succeeding rulers are likewise descended, though in more remote degree of relationship. Upon the founding of

the Empire more than 2600 years ago, Emperor Jimmu declared in Imperial Rescript:

> "We shall build our Capitol all over the world, and make the whole world our dominion."

In the modern Japanese military textbook known as "The Army Reader", it is said of this declaration:

> "This Rescript has been given to our race and to our troops as an everlasting categorical imperative."

Willard Price in his recently published book entitled "Japan Rides the Tiger", in speaking of this Rescript, at page 201 states:

> "This fantastic sense of responsibility is diligently drilled into the mind of every child of the Empire. He grows up believing with every fiber of his being: Japan is the divine land. Japan's emperor is the only divine emperor. Japan's people are the only divine people."

In 1941 on the occasion of the celebration of the 2601st anniversary of the Japanese government, Baron Kiichiro Hiranuma, the Home Minister, indicated faithful adherence to the principles and purposes of the Japanese government. On that occasion he said:

> "Japan's national polity is unique in the world. Heaven sent down Niningi-no-Mikoto (grandson of the Sun Goddess) to Kashihara in Yamato Province with a message that their posterity should reign over and govern Japan for ages eternal. It was on this happy day, 2601 years ago, that our first Emperor, Jimmu, ascended the Throne. Dynasties in foreign countries were cre-

ated by men. Foreign kings, emperors, and presidents are all created by men, but Japan has a Sacred Throne inherited from the Imperial Ancestors. Japanese Imperial Rule, therefore, is an extension of Heaven. Dynasties created by men may collapse, but the Heaven-created Throne is beyond men's power."

Japan's ambition and intention to conquer and rule the world has continued from the founding of the Empire, and proper appraisal of the Japanese character and the purposes of the Japanese government by the United States would have resulted in a policy of dignified firmness, and if such policy had been pursued, probably we would not now be at war with Japan.

The military authorities of the United States determined that, as a war measure, Japanese within the United States, those born here as well as those born elsewhere, should be interned to prevent their rendering aid to Japan's forces. It may be that some of those people so interned notwithstanding their education and training are really loyal to this Republic but it sorely taxes credulity that many of them truly wish or would at all aid in the defeat of their own people.

It is quite likely that the framers of the Constitution of the United States knew little of the ambitions of the Japanese government or the characteristics of the Japanese people, and it is probable that the members of the Congress in 1866 were not better informed. Certain it is that the thought of neither body comprehended the Japanese.

The Preamble of the Constitution, it would seem, expressly prohibited extension of citizenship to Japanese by constitutional amendment, or otherwise, if such action would not tend to achieve the constitutional objectives stated in the Preamble. These objectives are:

(1) To form a more perfect Union.

(2) To establish justice.

(3) To insure domestic tranquility.

(4) To provide for the common defense.

(5) To promote the general welfare, and

(6) To secure the blessings of liberty to ourselves and our posterity.

It will not be contended that the Fourteenth Amendment repealed or even modified the Preamble. The purposes of the Constitution, as declared in the Preamble, we hope have survived the Fourteenth Amendment and the Wong Kim Ark decision.

That case decided that a Chinese born in the United States was made a citizen by the Fourteenth Amendment and that decision in no fashion conflicts with the Preamble. The racial characteristics of the Chinese and the form, objectives and purposes of the Chinese government negative the contention that the extension of citizenship to Chinese born in the United States will tend to defeat constitutional purposes.

A provision of the Constitution whether found in the Constitution as originally adopted or in an amend-

ment should be so construed as to preserve and effectuate the constitutional objectives. This Court has had frequent occasion to consider the purposes of the Constitution as declared in its Preamble in construing constitutional provisions. In *U. S. v. Classic,* 313 U. S. 299, it is said:

> "Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. Davidson v. New Orleans, 96 U. S. 97; Brown v. Walker, 161 U. S. 591, 595; Robertson v. Baldwin, 165 U. S. 275, 281, 282. If we remember that 'it is a Constitution we are expounding', we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."

Other authorities fully supporting the *Classic* case are cited in the brief accompanying this petition, and in the brief also are cited authorities to the effect that the literal meaning of words used should not be followed where such construction will "defeat rather than effectuate the constitutional purpose".

The facts involved in the *Wong Kim Ark* case are not the same as, nor are they similar, to the facts involved in the present case. The difference is not that one is a Chinese and the other is a Japanese. The difference is in the wide dissimilarity of characteristics of the two peoples and of the objectives of their

respective governments. Whether a Japanese born in the United States is a citizen of the United States has never been decided by this Court. Indeed, that question has never heretofore been presented to this Court for decision. The question is one of paramount importance deeply concerning this government and our people. The decision of this Court will put at rest a much vexed question and will serve as a guide to those charged with the prosecution of the war, and will make certain future policy in reference to Japanese residents.

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
April 28, 1943.

U. S. WEBB,
WEBB, WEBB & OLDS,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

JOHN T. REGAN,
Petitioner,

vs.

CAMERON KING, as Registrar of Voters in the City and County of San Francisco, State of California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals appears in Transcript of Record at page 42.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals was entered on February 20, 1943. (R. p. 43.)

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE AND QUESTIONS PRESENTED.

(a) Statement of the Case.

The facts are not in controversy. The facts as found by the Court appear in Transcript of Record at pages 18 to 26, both inclusive, and are stipulated to be correct. (R. p. 32.) The facts so far as need be set out in this summary are that respondent is now and since March 1941 has been the Registrar of Voters of the City and County of San Francisco, and as such is charged with the registration of electors of the State of California who reside therein, and with the care, custody and control of the register of voters therein; that registration is a prerequisite to the right of an elector to vote, including the right to vote for members of the House of Representatives, for members of the United States Senate and for Presidential electors; that such registration is permanent and the name of anyone placed upon such register remains thereon during the life of the registrant and entitles such registrant to vote at all elections held in the City and County, unless such registration be sooner terminated for causes not herein involved, or cancelled upon the production of a certified copy of a judgment directing the cancellation to be made. That petitioner is a citizen of the United States and of the State of California, is and for several years last past has been a resident of such City and County, and is

now and for several years last past has been a duly registered and qualified elector in such City and County and entitled to vote at all elections held therein for members of the House of Representatives and members of the Senate and Presidential electors.

That petitioner has for several years last past regularly voted at elections held in such City and County, and it is his right and intention to so vote at elections hereafter held therein.

That by the Constitution and laws of the United States, and the Constitution and laws of the State of California, the privilege of an elector, including the privilege of voting and of registration, is granted only to citizens of the United States and is withheld from and prohibited to all aliens ineligible to citizenship in the United States.

That among the many Japanese so registered and heretofore so voting and who will continue in subsequent elections to vote are those named at pages 22 and 23 of the Transcript of Record.

That such Japanese have for several years last past customarily voted in such City and County at elections held therein for members of the House of Representatives, members of the Senate and for Presidential electors, and will continue so to do at elections hereafter to be held unless their registration be terminated and cancelled and their names removed from the register of voters.

That the Japanese so registered and so voting were born in the United States.

That it is the right and privilege of the petitioner as a citizen of the United States and of the State of California to have all votes cast by him given their full and true value, force and effect with the votes of all other duly and regularly registered and qualified electors only, all without interference, impairment or denial, by or through persons ineligible to exercise the rights and privileges of electors of the State of California.

That unless the respondent is ordered and directed to strike and remove the names of said Japanese from the register of voters of the City and County of San Francisco, said Japanese will vote at all elections hereafter held in said City and County.

(b) Questions Presented.

Petitioner contends that the Japanese in question have been illegally registered and that their names should be stricken from the rolls.

Petitioner contends that Japanese wherever born are not citizens of the United States.

Petitioner contends that the registration of Japanese is illegal and that their names should be stricken from the rolls.

Petitioner contends that the voting by Japanese is an invasion of his rights as a citizen of the United States.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Circuit Court of Appeals erred—

(1) In holding that Japanese persons born in the United States are citizens of the United States.

(2) In dismissing plaintiff's action.

(3) In holding that the question here involved had been decided by this Court in *U. S. v. Wong Kim Ark*, 169 U. S. 649, and in *Perkins v. Elg*, 303 U. S. 325.

I.

ARGUMENT AND AUTHORITIES.

The Thirteenth, Fourteenth and Fifteenth Amendments to the Federal Constitution.

About eight months after the surrender at Appomatox the Thirteenth Amendment to the Federal Constitution was adopted by the Congress and was ratified by the required number of States in December 1865. The first sentence of that amendment is:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

If not by President Lincoln's Proclamation of 1863, then by this amendment some three million Negroes theretofore slaves became freemen.

These freemen were for the most part born in the United States, were subject to its jurisdiction but were not citizens, and the great majority of them resided

in the several States which had seceded and which had not yet been readmitted into the Union.

The Fourteenth Amendment was introduced shortly after the close of the Civil War, adopted by the 39th Congress in 1866, and became a part of the Constitution in 1868.

While this amendment covered several subjects, unrelated in character, we are here concerned only with its first sentence reading:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The Fifteenth Amendment was adopted by the Congress in 1869 and became a part of the Constitution early in 1870 and the first paragraph reads:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

It was assumed by those urging these amendments that the ex-slaves, if given the right to vote, would vote the Republican ticket.

We have quoted the pertinent provisions of these amendments because they had a common object and should be considered together. That common object was the citizenship and enfranchisement of the Negro.

These three amendments were intended to deal alone with the Negro. The ultimate object was the enfranchisement of the Negro—to make of him a voter.

No one may question that the Thirteenth Amendment referred alone to the Negro. The Negro was a slave and the Thirteenth Amendment abolished slavery. The Negro thereupon became a subject but not a citizen. The next step in the process was to establish the citizenship of the ex-slave, hence the Fourteenth Amendment. The citizenship of the ex-slave being thus conferred by the Fourteenth Amendment, it was deemed that by express constitutional provision the new citizen should be made secure in the possession and exercise of the rights of the citizen, hence the Fifteenth Amendment which protected the new "citizen of the United States" in "the right * * * to vote".

Was the Fourteenth Amendment intended to apply to the Negro only? Did it intend to include all Asiatics born in the United States?

Let it be assumed that the Thirteenth Amendment had failed of approval by the States. In that event, does any one believe that the Fourteenth Amendment would have been proposed? The Thirteenth Amendment, failing of adoption, there would have been no call for the Fifteenth Amendment, for the Negro, not having the right to vote, would have had nothing to be protected in the States hostile to his citizenship.

The prevailing opinion in the *Wong Kim Ark* case, as to the Fourteenth Amendment, declares:

> "Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free Negroes."

If the word *only* had been used instead of the word "main", the statement would have been in complete harmony with the intention of Congress in proposing the three amendments.

II.

THE REPUBLIC OF THE UNITED STATES—BY WHOM AND FOR WHOM ESTABLISHED.

"Four score and seven years ago, our fathers brought forth on this continent, a new nation * * *"

—*Lincoln's Gettysburg Address.*

This country was settled by white people from European countries. The people who comprised the original Thirteen Colonies, who framed the Articles of Confederation and who administered the government under such Articles were white people from European countries and their descendants who may be called, for lack of a better name, Caucasians. The only people with whom they came in contact who were not white were Indians or Negroes and the latter were slaves.

During the Colonial period there were no Asiatics in this country. Except the Indian and the Negro, the colonists had contact with whites only, and they sought to establish in the New World a government of, for and by white people. The Declaration of Independence was made by white people and catalogued the evils from which they had suffered.

After these people had won their freedom, their basic law, the Articles of Confederation, having proved insufficient and defective, their representatives met for the purpose of strengthening such organic law. That assembly soon arrived at the conclusion that their objectives could not be achieved through amendment or modification of the Articles of Confederation and they then determined that a new organic law should be framed and addressed themselves to the drafting of a Constitution.

After four months of deliberation the Constitution of the United States as it now stands, except for the amendments that have since been added, was adopted. It was adopted as a new and basic law of the Republic of the United States, a government to be composed of the people who had framed it and their descendants, "a government of the people, by the people, for the people". And it was that government to which Lincoln at Gettysburg urged "increased devotion" that it should "not perish from the earth".

Among the many powers conferred upon the Congress by the sovereign people was the power to adopt and provide for an uniform system of naturalization. It was recognized by the framers of the Constitution that other people would wish to come to this land and it was their view that such immigration was desired. They contemplated, however, that those who came would be sympathetic with and supporters of the Republic. They well knew that that sympathy and support for the new government could be best assured by restricting citizenship of those hereafter coming to

Europeans, and that even then, before that privilege should be conferred, those potential citizens should be given here a period of probation, then examined and if found worthy, they should take an oath binding themselves to the support of this government and severing all relations with and all allegiance to the governments from which they came.

Congress exercised its power "to establish an uniform law of naturalization" by providing that "free white persons" might gain through that process the privilege of American citizenship.

Reference to historical facts is not made with any thought that the members of this Court are not with them entirely familiar, but rather to bring them freshly to mind for they furnish an enduring light and he who essays the construction of constitutional provisions without availing himself of such light labors in darkness.

The Constitution was ratified by the requisite number of States on June 21, 1788. On April 30, 1789, Washington was inaugurated President of the United States. The naturalization law extending the privilege of citizenship to white persons only was passed by Congress and approved by the President in the following year. Washington presided at the Constitutional Convention and he was the first to sign the Constitution. As President of the United States he gave executive approval to the law restricting naturalization to white persons. A number of the persons whose names were appended to the Constitution as members of Congress participated in the adoption of that law.

III.

UNIFORM NATURALIZATION LAW.

The naturalization law thus adopted in 1790 has been amended a score of times and always Congress has held steadfastly to the original policy. The restriction to free white persons has been adopted in every amendment except in two instances, one occurring in 1870 when Congress in effecting the purposes of the Thirteenth, Fourteenth and Fifteenth Amendments, extended the privilege to "aliens of African nativity and to persons of African descent", and the other, in 1873 when a committee codifying the naturalization laws in its report inadvertently omitted from the provision the words "free white persons" but upon discovery in the following year these words were restored and continue in the law to the present day. It is significant, too, that when it was sought to restore these words to the statute, some members of Congress opposed such action, contending that the time had come to extend the right of naturalization to all peoples of the world. This proposal, however, was overwhelmingly defeated.

The word "free" as used in the Immigration Statute was used in the early enactment because slavery existed at that time and some white persons were held as slaves to some extent in the Colonies and certainly in some of the countries from which these people came. The word no longer has significance and may now be eliminated from consideration.

This situation was recognized by the Supreme Court of the United States and in *U. S. v. Ozawa,* 260 U. S. 178, 198, 67 L. ed. 199, the Court said:

> "Undoubtedly the word 'free' was originally used in recognition of the fact that slavery then existed, and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded."

The original statute and all subsequent amendments may be now regarded and construed as though the word "free" had never been used.

By the uniform naturalization law Congress has never extended the privilege of naturalization to other than white persons, except by the provision adopted in 1870 providing for the naturalization of Negroes and by special acts extending the right to Filipinos and Puerto Ricans who had served in the armed forces of the Union.

We have called to the Court's attention the legislative history of the naturalization laws steadfastly pursued by Congress prior to the Fourteenth Amendment and as steadfastly pursued by Congress since that amendment for the purpose of emphasizing the improbability that Congress by the amendment intended any change in the policy which it has steadily pursued during the century and a half of the Republic's existence, except as to Negroes. In fact, it seems clear that Congress did not intend by proposing the Fourteenth Amendment any other change in that policy and if the Fourteenth Amendment has been correctly construed in that regard the change was achieved without Congress intending any such result.

We have referred to the several acts passed by Congress extending naturalization on more favorable terms to "aliens" who had served in the armed forces of the Union. The construction of these acts by the Supreme Court of the United States made subsequent to the decision of the *Wong Kim Ark* case is of special significance.

In 1921, *Toyota v. U. S.*, 268 U. S. 402, 69 L. ed. 1016, Hidemitsu Toyota, a native born Japanese who had served for a number of years in the armed forces of the United States and who had received "eight or more honorable discharges", applied for naturalization in the United States District Court for the District of Massachusetts and his application was granted. Thereafter a proceeding was brought to cancel the certificate of naturalization on the grounds that it had been illegally procured and the District Court held that the applicant was not entitled to be naturalized and entered its decree cancelling the certificate. An appeal having been taken to the Circuit Court of Appeals, that Court certified to the Supreme Court of the United States the two questions involved, (1) whether a person of the Japanese race, born in Japan, may be naturalized under the 7th Subdivision of Section 4 of the Act of June 29, 1906 as amended by the Act of May 9, 1918, and (2) whether such subject may legally be naturalized under the Act of June 19, 1919.

The opinion of the Court after reviewing many of the special acts involved and the decisions of Courts construing them, answered both questions in the negative.

It was the view of the Court that the word "aliens", as well as the words "any person of foreign birth", as used in these statutes, though comprehensive in form, were not to be literally construed but were to be given a meaning that would accord with the policy in reference to naturalization so long pursued. At page 412 of the opinion it is said:

> "The element of color and race included in that section is not specifically dealt with by section 30, and, as it has long been the national policy to maintain the distinction of color and race, radical change is not likely to be deemed to have been intended."

Not only in matters of naturalization has Congress persisted generally in the policy of admitting to citizenship white persons only but that purpose runs through legislation affecting the immigration of colored races. The Chinese Exclusion Law prohibited the immigration of Chinese. In 1917 an act was adopted which prohibited immigration to this Country of the people of a large area in which was included all of India. In 1924 Congress amended the Immigration Law so that it now prohibits the immigration to this Country of all persons "ineligible to citizenship". The Chinese Exclusion Law was passed prior to the decision of *Wong Kim Ark*. The Act of 1917, usually referred to as the Barred Zone Act, as well as the amendment of the Immigration Law of 1924, was passed subsequent to the decision in that case. Thus Congress has evidenced its intention both before and after the *Wong Kim Ark* case to restrict immigration as well as naturalization to white persons.

In *U. S. v. Ozawa,* heretofore cited, the Supreme Court of the United States held that a Japanese was not entitled to naturalization because he was not a white person as that term was used in the naturalization laws. In the following term the Court held in *U. S. v. Thind,* 261 U. S. 206, 67 L. ed. 617, that a Hindu was not entitled to naturalization for the reason that he was not a white person and the Court pointed out that it was not reasonable to assume that Congress did intend to extend naturalization to peoples whose immigration to this Country had been expressly prohibited, the Court saying:

> "It is not without significance in this connection that Congress, by the Act of February 5, 1917, 39 Stat. at L. 874, chap. 29, Sec. 3, Comp. Stat. Sec. 4289¼b, Fed. Stat. Anno. Supp. 1918, p. 214, has now excluded from admission into this country all natives of Asia within designated limits of latitude and longitude, including the whole of India. This not only constitutes conclusive evidence of the Congressional attitude of opposition to Asiatic immigration generally, but is persuasive of a similar attitude toward Asiatic naturalization as well, since it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants."

IV.

DECISION OF THE COURT BELOW IS BASED UPON THE WONG KIM ARK AND THE ELG CASES.

The Circuit Court of Appeals for the Ninth Circuit was of the opinion that all persons born in the United

States were made citizens of the United States by the Fourteenth Amendment "as interpreted by the Supreme Court of the United States in *U. S. v. Wong Kim Ark,* 169 U. S. 649, and a long line of decisions including the recent decision in *Perkins, Secretary of Labor, et al. v. Elizabeth Elg,* 307 U. S. 625." (R. p. 42.)

We have not found the "long line of decisions" but will consider the two cases mentioned.

Wong Kim Ark was a Chinese born in the United States and based his claim to citizenship upon the first sentence of the Fourteenth Amendment of the Federal Constitution. The Supreme Court of the United States approved his claim and declared him to be a citizen of the United States solely because he was born therein.

The decision was made by a divided Court, Justice Gray writing the majority opinion in which five of his associates concurred. Justice McKenna did not participate. A dissenting opinion was submitted by Chief Justice Fuller with whom Justice Harlan concurred. The majority opinion was based upon the single fact that Wong Kim Ark was born in the United States. It did not deal with the question of race or color except in its reference to Negroes and Indians. It ignored the fact that for more than one hundred years Congress in the exercise of its power to adopt uniform naturalization laws had steadfastly restricted the right of naturalization to white people. It made no reference to the objectives of the Constitution as declared in the Preamble of that instrument.

It did not consider the question of fitness or adaptability for American citizenship. As understood and applied by the Court below, it makes potential citizens of peoples of every race, of every color, the adherents to every form of government, however antagonistic to the principles of this Republic. It excludes the principle and practice of selection. It makes citizenship depend alone upon the answer to the question—where born? If this be the law, new standards by which to evaluate the dignity of American citizenship must be found.

The Fourteenth Amendment granted citizenship to all negroes born in the United States but it did not take care of negroes resident in the United States, of whom there were many, born elsewhere. It was, of course, realized that all negro residents in the United States should be given the same status. Negroes were originally brought to the United States and were held in slavery. The United States was responsible for their presence here and for them after their emancipation. The majority in Congress in the flush of victory determined to make them citizens, hence the Fourteenth Amendment. But the Fourteenth Amendment resulted in the division of resident negroes into two classes—those born here and those born elsewhere—making citizens of the one but not of the other. To meet this situation, within two years after the ratification of the Fourteenth Amendment the naturalization law was amended by extending the privilege of citizenship to "aliens of African nativity and to persons of African descent", thus providing a method for the acquirement of citizenship by negroes not born here.

If it had been the purpose of the Fourteenth Amendment to include all colored races, it is reasonable to assume that the naturalization law would have been so amended as to give to other people of color the same privilege as by the amendment was given to the negro. The naturalization law was not then or at any other time amended so as to extend the privilege of naturalization to Chinese or to Japanese, or other colored peoples, residents of but not born in the United States.

As to the Fourteenth Amendment, the majority opinion freely admits that: "its main purpose doubtless was, as has been often recognized by this Court, to establish the citizenship of free negroes", but held that by reason of the universality of the language employed all other peoples were included.

The opinion pointed out that under the common law of England all persons born in that Kingdom, with limited exceptions not here involved, were citizens of the British Empire and held that that law was in force here, and that it should be applied in the construction of the Fourteenth Amendment. The prevailing opinion has been freely and frequently criticized by jurists, lawyers and publicists who concur in the view that the dissenting opinion presents the correct exposition of law upon the question involved.

In the minority opinion at page 709, Vol. 169 U. S., it is said:

> "The framers of the Constitution were familiar with the distinction between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and

invisible character of origin, and there is nothing to show that in the matter of nationality they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.

"Manifestly, when the sovereignty of the Crown was thrown off and an independent government established, every rule of the common law and every statute of England obtaining in the colonies, in derogation of the principles on which the new government was founded, was abrogated."

And at page 731, the conclusion arrived at is stated as follows:

"I think it follows that the children of Chinese born in this country do not, *ipso facto,* become citizens of the United States unless the 14th Amendment overrides both treaty and statute. Does it bear that construction; or, rather, is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?"

We are not unmindful that a dissenting opinion, however persuasive and however sound, is not the decision of the Court. Nevertheless, not infrequently has it occurred that the views upon which a dissenting opinion were based later became the wisdom of the majority opinion of the same Court, and we think it likely, if the Court be given the opportunity, such result will here follow.

Due regard to the facts involved in the case of *Perkins v. Elg,* 307 U. S. 325, make clear that it is not

a reaffirmance of the doctrine of the *Wong Kim Ark* case and gives no support to the judgment of the Court below.

In *Perkins v. Elg* the facts were, as stated by Mr. Chief Justice Hughes in the first paragraph of the opinion:

> "The question is whether the plaintiff, Marie Elizabeth Elg, who was born in the United States of Swedish parents then naturalized here, has lost her citizenship and is subject to deportation because of her removal during minority to Sweden, it appearing that her parents resumed their citizenship in that country but that she returned here on attaining majority with intention to remain and to maintain her citizenship in the United States."

From this statement of the facts it appears that Miss Elg was doubly, if such a thing be possible, a citizen of the United States. She was a citizen of the United States because (1) She was a white person born in the United States and a citizen thereof at the time of birth under either construction of the Fourteenth Amendment and (2) she was a citizen of the United States under the naturalization laws, her parents being naturalized citizens at the time of her birth. She was a Swede, a white person, a Caucasian, and the Swedes were among the first settlers in this country, participated in the revolution, and in the founding of the new government, and were included within "We, the People of the United States." Indeed, the only question involved was whether Miss Elg's citizenship had been forfeited by reason of the

removal of her parents from the United States and their voluntary expatriation during her minority.

It appeared also that within eight months after she reached majority she returned to the United States and continued to reside therein. Some six years after such return she was threatened with deportation on the claim that she was not a citizen and out of this threat the case arose. The Court without difficulty held that her citizenship had not been lost.

V.

THE EXPRESSION "ALL PERSONS" AS USED IN THE FOURTEENTH AMENDMENT IS GENERAL IN CHARACTER BUT A RESTRICTED MEANING MAY BE GIVEN TO SUCH GENERAL TERMS WHERE NECESSARY TO ACCOMPLISH THE PURPOSES INTENDED.

General expressions in a constitutional provision will not be literally followed where such construction will not accomplish the purpose intended. In *Ozawa v. United States,* 260 U. S. 178, it is said:

> "It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not

fail. See Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Heydenfeldt v. Daney Gold & S. Min. Co., 93 U. S. 634, 638, 23 L. ed. 995, 996, 13 Mor. Min. Rep. 204."

In *U. S. v. Lefkowitz,* 285 U. S. 452, it is said:

"And this Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions."

In harmony with the authorities just cited is the recent case of *U. S. v. Classic,* 313 U. S. 299, where it is said:

"For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Brown v. Walker, 161 U. S. 591, 595, 40 L. ed. 819, 820, 16 S. Ct. 644, 5 Inters. Com. Rep. 369; Robertson v. Baldwin, 165 U. S. 275, 281, 282, 41 L. ed. 715, 717, 718, 17 S. Ct. 326. If we remember that 'it is a Constitution we are expounding', we can-

> not rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose."

Many other authorities might be cited but it is believed that the rule is so well settled that it will not be here challenged.

VI.

THE PREAMBLE OF THE FEDERAL CONSTITUTION.

In the Preamble of the Federal Constitution the great purposes of that instrument are enumerated. It reads:

> "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

That in case of doubt as to the intention of Congress the Preamble should be resorted to in ascertaining the proper construction to be made of the provision is a rule that admits of no exceptions.

We believe the first reference to the Preamble in a decision of the Supreme Court of the United States was made in *Chisholm v. Georgia,* 2 Dall. R. 419, decided in the February term, 1793. This was the eighth case decided by that Court and the first one in which

a grave constitutional question was involved. Mr. Chief Justice Jay, at page 475 said:

> "Let us now turn to the Constitution. The people therein declare, that their design in establishing it, comprehended *six* objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To ensure domestic tranquillity. 4th. To provide for the common defense. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful to consider and trace the relations which each of these objects bears to the others; * * * and to shew that they collectively comprise every thing requisite, with the blessings of Divine Providence, to render a people prosperous and happy; on the present occasion such disquisitions would be unreasonable, because foreign to the subject immediately under consideration."

It is probable that at that time no one was better qualified than the then Chief Justice to speak of the "design" of the framers of the Constitution.

In *Cohen v. Virginia,* 6 Wheaton 264, 5 L. ed. 257, Chief Justice Marshall said:

> "The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority.
>
> "To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided,

the people of the United States have declared, that they are given 'in order to form a more perfect union, establish justice, insure domestic transquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity'.

"With the ample powers confided to this supreme government for these interesting purposes are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes."

In *Story on the Constitution,* 5th Ed., Chap. VI, Sec. 459, it is said:

"The importance of examining the preamble, for the purpose of expounding the language of a statute has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute. We find it laid down in some of our earliest authorities in the common law, and civilians are accustomed to a similar expression, *cessante legis proemio, cessat et ipsa lex.* Probably it has a foundation in the expression of every code of written law, from the universal principle of interpretation, that the will and intention of the legislature are to be regarded and followed. It is properly resorted to where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except

> in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble."

In *U. S. v. Classic,* heretofore cited and quoted from, reference is made to the "great purposes which were intended to be achieved by the Constitution as a continuing instrument of government". The great purposes there referred to are the purposes enumerated in the Preamble, and are the same great purposes referred to by Mr. Chief Justice Marshall in *Cohen v. Virginia.*

Only a few months ago in *Ex parte Richard Quirin,* reported in Vol. 87, No. 1 of the Advance Opinions of the Supreme Court of the United States, it was said:

> "Congress and the President, like the Courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its Preamble, is to 'provide for the common defense'."

From these authorities, it will be seen that the Supreme Court of the United States has always turned to the Preamble of the Constitution to ascertain constitutional purposes and has construed substantive provisions of the Constitution following so as not to "defeat", but so as to "effectuate the constitutional purpose".

VII.

THE GRANTING OF CITIZENSHIP TO JAPANESE IS NOT IN FURTHERANCE OF THE GREAT PURPOSES OF THE CONSTITUTION.

If Japanese citizenship furthers constitutional purposes the extension to them of citizenship is not inhibited. If their citizenship conflicts with constitutional purposes the Preamble prohibits such citizenship. This phase of the subject demands a specification of some of the characteristics of the Japanese people and of the polity of the Japanese government.

Because of racial characteristics Japanese assimilation with whites is as impossible as it is undesirable. Their Emperor is the head of their church as well as the head of the nation. Hence, it may be said that their church is their government and their government is their church.

They believe that a war waged by their Emperor is a just war and that death upon the battlefield makes certain a satisfactory eternity and this religious devotion is translated into military power.

The offspring of Japanese are taught the Japanese faith and the objectives of the Japanese government and are pledged to observance of both. Dishonesty, deceit and hyprocrisy are racial characteristics and it is within the code of Japanese obligations that deceit, dishonesty and hypocrisy shall be employed, practiced and pursued whenever and wherever the result will be to advance the designs of the Empire. The presence of Japanese in the United States has resulted in disturbing evils and this condition is inten-

sified by their ability to exercise the privileges of citizenship. Japan misled and deceived representatives of the United States government into a governmental policy through which Japan obtained from this government and from this country the material aid to build the war machine with which the United States is now confronted.

Japan has always claimed race superiority and has constantly declared that Japan was predestined to rule the world. This fateful doctrine was taught to Japanese children not only in the schools of Japan but in Japanese schools taught by Shinto priests maintained in the United States where children were given the same instruction as given in the schools maintained in Japan. Thousands of Japanese children born in this country were sent to Japan for their education and it is authoritatively stated that there are now in Japan more than fifty thousand Japanese born in the United States and now aiding the Japanese war effort.

It is the Japanese claim that the government of Japan is of divine origin, that the first Emperor was the grandson of the Sun Goddess, and that all succeeding rulers are likewise descended, though in more remote degree of relationship. Upon the founding of the Empire more than 2600 years ago, Emperor Jimmu declared in Imperial Rescript:

> "We shall build our Capitol all over the world, and make the whole world our dominion."

In the modern Japanese military textbook known as "The Army Reader", it is said of this declaration:

"This Rescript has been given to our race and to our troops as an everlasting categorical imperative."

Willard Price in his recently published book entitled "Japan Rides the Tiger", in speaking of this Rescript, at page 201 states:

"This fantastic sense of responsibility is diligently drilled into the mind of every child of the Empire. He grows up believing with every fiber of his being: Japan is the divine land. Japan's emperor is the only divine emperor. Japan's people are the only divine people."

In 1941 on the occasion of the celebration of the 2601st anniversary of the Japanese government, Baron Kiichiro Hiranuma, the Home Minister, indicated faithful adherence to the principles and purposes of the Japanese government. On that occasion he said:

"Japan's national polity is unique in the world. Heaven sent down Niningi-no-Mikoto (grandson of the Sun Goddess) to Kashihara in Yamato Province with a message that their posterity should reign over and govern Japan for ages eternal. It was on this happy day, 2601 years ago, that our first Emperor, Jimmu, ascended the Throne. Dynasties in foreign countries were created by men. Foreign kings, emperors, and presidents are all created by men, but Japan has a Sacred Throne inherited from the Imperial Ancestors. Japanese Imperial Rule, therefore, is an extension of Heaven. Dynasties created by men may collapse, but the Heaven-created Throne is beyond men's power."

Japan's ambition and intention to conquer and rule the world has continued from the founding of the Empire, and proper appraisal of the Japanese character and the purposes of the Japanese government by the United States would have resulted in a policy of dignified firmness, and if such policy had been pursued, probably we would not now be at war with Japan.

The military authorities of the United States determined that, as a war measure, Japanese within the United States, those born here as well as those born elsewhere, should be interned to prevent their rendering aid to Japan's forces.

Through investigations by the military authorities, aided by the investigating departments of the federal government, it was ascertained that this action was necessary because of the mass disloyalty of resident Japanese. The action was taken to prevent these Japanese from aiding behind the lines the Japanese effort to conquer, their threat to destroy, the United States.

This Nation is at war with Japan. Japan seeks the destruction of this government and the subjugation of our people. This condition did not exist in 1866 but it was then a possibility, even a probability. The framers of the Constitution of the United States had no acquaintance with the Japanese and "The People of the United States", as used in the Constitution, did not comprehend Japanese and the naturalization legislation immediately following expressly excluded them. The Preamble of the Constitution ex-

pressly prohibited a subsequent extension of citizenship to the Japanese by constitutional amendment, if such action did not tend to achieve the objectives as stated in the preamble. The record of events since the adoption of the Constitution, including Pearl Harbor, Singapore, Bataan, Guadalcanal, and a hundred other fields and waters in which American citizens have been slaughtered by Japanese proclaim in thunder tones that Japanese citizenship conflicts with the objectives of the Constitution, nor should the execution, the murder of American prisoners of war, but a few days ago disclosed, be overlooked. Let no one conclude that this was an abnormal act of the Japanese government nor that it is unapproved by the Japanese people. These atrocities are not the result of change in the government of Japan or in the Japanese people. These murders were but a normal happening of the Japanese government as created and as maintained for the twenty-six hundred years of its existence. The government of Hirohito is the government established by Jimmu.

When this case was commenced, we to a large extent had to depend upon common knowledge for proof of the correctness of our characterization of the Japanese people and the Japanese government. However, since then there has been issued by the Department of State a book entitled "Peace and War, United States Foreign Policy, 1931-1941", commonly referred to as the "White Book", which we now have before us. In its 144 pages is given a detailed history of the relations existing between the Japanese Empire

and the United States from 1931 to Pearl Harbor. In this history is set forth official communications, proposals, conferences, and conversations between this Government and the Empire of Japan, and this history proves incontestably every assertion we have made in this brief. It presents a record of duplicity, misrepresentation and dishonesty that should shock even the most ardent of Japanese sympathizers. The last of these conferences was concluded about one hour after the assault on Pearl Harbor had begun. The limits of this brief will not permit extensive quotations from this book of disclosure. We cannot refrain, however, from quoting the last expression of Secretary Hull to the Japanese representatives with whom he was in conference while Pearl Harbor was being destroyed, though before the news of the attack had been received. Quoting from page 142, Secretary Hull said to the Japanese representatives:

> " 'I have never seen a document that was more crowded with infamous falsehoods and distortions—infamous falsehoods and distortions on a scale so huge that I never imagined until today that any Government on this planet was capable of uttering them.' "

Japanese citizenship will not aid in forming a more perfect Union.

The vesting in these people of the privileges and immunities of American citizenship will not aid in the establishment of justice.

Domestic tranquility is not insured by their participation in the affairs of this government. On the

contrary, history is replete with evidence that their presence here and their participation in the affairs of this government destroy domestic tranquility.

The fifth column activities of the Japanese on the mainland and in Hawaii and elsewhere establish beyond question that neither their citizenship nor their presence is provision for the common defense.

The history of Japanese activity and an appreciation of their racial characteristics establish clearly that their citizenship in no fashion promotes the general welfare of the people of the United States, and finally,

Neither their presence in the United States, nor their citizenship tends in any fashion to secure the blessings of liberty to ourselves or our posterity.

Their citizenship militates against each of the enumerated objectives.

It is pertinent to inquire here who was included in "ourselves and our posterity". "Ourselves" included those who framed the Constitution and all the people for whose government it was framed. "Ourselves" included white people only—surely it did not include Japanese! The "posterity" of ourselves included white people only—surely those who framed the provision did not contemplate Japanese! The white people of that day did not regard Japanese as their posterity, and by no constitutional or legislative enactment could the term be so expanded as to include them now. Common sense repels the thought that the framers of the Constitution designed to make certain that

the blessings of liberty would be secured to the Japanese people. Had the design, the intent, or the purpose of the framers of the Constitution been considered by the Court in the *Wong Kim Ark* case, it is believed that it would have been declared, with the exception of the Negro, the incident of birth established the citizenship of those people only who were then eligible to become citizens.

We are not unmindful that the Republic of the United States since the adoption of the Constitution has been at war with European nations and that we are now at war with European nations. People from each of these nations were among the first European immigrants to this continent. People from each of the European nations and their descendants—their posterity—participated in all the activities of the Colonial period, in the Revolutionary War, and in the adoption of the Constitution. It was this "We, the People of the United States"—the white people—the American people—who won the independence and established the Republic.

It was doubtless realized that war with the mother countries might in the course of time occur. This was a possibility that could not be avoided. It was a hazard that had to be taken but it was confidently believed by the framers of the Constitution, and the people of the States adopting it, that in such event the people of the United States and their posterity would be loyal to the government they had created.

This case was commenced in the belief that the *Wong Kim Ark* case had been erroneously decided

and it was assumed that a decision of this Court approving the *Wong Kim Ark* case would rule the instant case. Though the lower Courts placed their reliance upon the *Wong Kim Ark* case, we still believe the decision to have been erroneous. In the Courts below, as here, we called attention to the characteristics of the Japanese people and to the form, purposes and policy of their government. We have also pointed out the difference in the characteristics between the two governments and the two peoples and have expressed the view that the citizenship of Chinese born in this country will not conflict with objectives of the Constitution. We think it proper here to suggest that if in the construction of the Fourteenth Amendment the classification of peoples based upon color is not adhered to, it may properly be held that the *Wong Kim Ark* case was correctly decided, it being remembered that there was involved peoples whose citizenship would not tend to defeat constitutional purposes. Such construction of the Fourteenth Amendment would not include Japanese.

It was said in the brief in the Court below "should Wong Kim Ark be overruled, this suit offers no real threat to the Chinese. Congress can in a fortnight pass an act to extend to Chinese born in this country citizenship".

The facts involved in the *Wong Kim Ark* case are not the same as, nor are they similar, to the facts involved in the present case. The difference is not that one is a Chinese and the other is a Japanese. The difference is in the wide dissimilarity of characteris-

tics of the two peoples and of the objectives of their respective governments. Whether the Japanese born in the United States is a citizen of the United States has never been decided by this Court. Indeed, that question has never heretofore been presented to this Court for decision. The question is one of paramount importance deeply concerning this government and our people. The decision of this Court will put at rest a much vexed question and will serve as a guide to those charged with the prosecution of the war, and will make certain future policy in reference to Japanese residents.

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
April 28, 1943

U. S. WEBB,
WEBB, WEBB & OLIS,
Counsel for Petitioner.